U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 15 2010

SRC-07-216-51351

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry concerning your case must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a university. It seeks to employ the beneficiary permanently in the United States as a director of university communications pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), which was certified by the Department of Labor (DOL).

The director determined that the petitioner failed to demonstrate that the beneficiary was qualified for classification as a member of the professions holding an advanced degree prior to the priority date as set forth on the certified Form ETA 750 in the instant case. The director denied the petition accordingly.

The record shows that the appeal is properly and timely filed. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The record shows that there is no dispute between the director and the petitioner on the conclusion that the beneficiary was qualified for the proffered position prior to December 4, 2002, but not before December 17, 2001. The single issue in the instant case is which date should be properly considered as the priority date, December 17, 2001 or December 4, 2002. While the director determined that the priority date in this case is December 17, 2001 based on the labor certification and its final determination from DOL, counsel asserts on appeal that the priority date in this case should be December 4, 2002 when the second Form ETA 750 for the instant proffered position was filed with DOL instead of the date the initial Form ETA 750 for another position was filed.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

Here, the Form I-140 was filed on July 5, 2007. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability.

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

The record contains a copy of the Form ETA 750 that the instant petitioner initially filed with Rhode Island Department of Labor & Training (RIDLT) on behalf of the beneficiary for a position of Assistant Director – Communications & Marketing. The submission letter from the petitioner's counsel was dated December 10, 2001 and the form indicates December 17, 2001 as the date on which the forms were received by the DOL local office. On December 4, 2002, counsel for the petitioner submitted a new Form ETA 750 for the position of Director of University Communications to RIDLT. In the submission letter, counsel wrote in pertinent part that:

> Per our recent conversation, [the beneficiary] was promoted to a new position (Director of University Communications) after the ETA 750 was filed with your office. Therefore, I have attached a new ETA 750, in duplicate, to be substituted for the current ETA 750 on record with your office. **Per our conversation, it is my understanding that [the beneficiary] will retain the earlier priority date established by the prior filing.** Therefore, assuming this true, I trust that your office will endorse the attached application with the already established priority date and return the other application to my office.

(Emphasis in original)

Per counsel's request, RIDLT returned the Form ETA 750 for the position of Assistant Director and counsel's submission letter dated December 10, 2001 with a handwritten note from the officer of RIDLT. The handwritten note says "returned per your request ... ... Priority date 12/17/01."

The record also contains a copy of a letter dated April 8, 2004 from RIDLT to counsel regarding the labor certification application filed by the petitioner in this case on behalf of the instant beneficiary. This letter stated impertinent part that:

> This letter is to acknowledge receipt of your application for Alien Labor Certification. We received your application on December 17, 2001. This will be your priority date.

The submitted original Form ETA 750 for the position of Director of University Communications certified by the DOL Employment and Training Administration Philadelphia Backlog Elimination Center on February 26, 2007 to the petitioner contains December 17, 2001 as the date forms received by the DOL local office. The final determination on the labor certification indicates that the date of acceptance for processing is December 17, 2001.

On appeal, counsel, citing 9 FAM 42.53 N3.2, argues that the RIDLT's assigned priority date (12/17/2001) is incorrect because the priority date accorded to an employment-based second or third preference petition based upon an individual labor certification application is the date on which the labor certification was accepted for processing by an employment service office in the DOL.

While this office concurs with counsel that the priority date is the date the individual labor certification application was accepted for processing by any office within the employment system of the DOL *See* 8 C.F.R. § 204.5(d), we do not find that the petitioner filed and the DOL Rhode Island office accepted new labor certification application for processing on December 4, 2002. Instead, the records show that on December 4, 2002, the petitioner submitted a new form to substitute, correct, or amend the already existing labor certification thereby retaining the original priority date. Counsel expressly requested to retain the already established priority date from the application filed and accepted by RIDLT on December 17, 2001. The acceptance of counsel's request and acknowledgement for retaining December 17, 2001 as the priority date for the underlying labor certification application was confirmed by DOL in the handwritten note on the returned submission letter dated December 10, 2001, in the letter dated April 8, 2004 from RIDLT, on the original certified Form ETA 750 and in the final determination on February 26, 2007. If the priority date of December 17, 2001 had been assigned incorrectly by DOL, counsel should have requested to correct it then. However, the record does not contain any evidence that counsel requested such a correction. Furthermore, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to United States Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Therefore, the AAO finds that the director correctly determined that the priority date in this case is December 17, 2001 as indicated on the DOL's final determination. The evidence in the record does

not support counsel's assertion that the priority date should be December 4, 2002 instead of December 17, 2001.

The certified labor certification requires a MBA degree in marketing, communications or related field and two years of experience in the job offered or related occupation in communications, marketing, promotions or related. However, the petitioner failed to demonstrate that the beneficiary possessed a MBA degree in marketing, communications or related prior to the priority date of December 17, 2001 and therefore, failed to establish the beneficiary's qualifications for the professional holding an advanced degree or the equivalent of an alien of exceptional ability. The petition must be denied and the appeal must be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.